80-1150

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1980

ALVIS L. SMITH, :

PETITIONER, :

-versus- : CASE #_____

STATE OF GEORGIA, :

RESPONDENT :

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF GEORGIA

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QUESTION PRESENTED

Was the right of the Petitioner to due process of law as outlined under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by the fact that the trial judge in the case did not charge the jury on the only defense presented by the evidence in the case, that being the defense of alibi.

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FROM THE COURT OF APPEALS

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Order of the Supreme Court of Georgia denying a Writ of Certiorari entered on the 24th day of September, 1980, and the Judgment of the Court of Appeals of the State of Georgia entered on the 2nd day of September, 1980.

OPINION BELOW

The Order of the Supreme Court of Georgia denying the Writ of Certiorari from the Opinion and Judgment of the Court of Appeals of Georgia was not accompanied by an official opinion (see Appendix B), but the Court of Appeals of Georgia wrote an official opinion dated September 2, 1980, (see Appendix A).

JURISDICTION

The final Order of the Georgia Supreme Court denying the Writ of Certiorari was made and entered on September 24, 1980. Since substantial federal questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Sec. 2, of the Constitution of the United States , 28 United States Code §1257(3), and Rule 19(1) of the Rules of the United States Supreme Court.

QUESTION PRESENTED

Was the right of the Petitioner to due process of law as outlined under the Fifth and Fourteenth Amendments to the Constitution of the United States violated by the fact that the trial judge in the case did not charge the jury on the only defense presented by the evidence in the case, that being the defense of alibi.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated as follows:

A. STATEMENT OF PLEADINGS IN THE CASE:

A felony indictment being No. 5316 was returned by the grand jury of Catoosa County, Georgia, charging the Petitioner herein with

the commission of rape, which offense is alleged to have occurred on December 25, 1975, in Catoosa County, Georgia. (R. 5,6)

The Petitioner herein entered a plea of not guilty to the charge in the indictment and subsequent to that, a jury trial was had and a guilty verdict returned on October 10, 1979. The Petitioner was then sentenced to serve fifteen (15) years in the Georgia State Penitentiary. (R. 17, 18)

B. STATEMENT OF FACTS:

During the trial of the case sub judice, the State introduced the testimony of Walter Smartt, then an FBI agent, who investigated the charges pending against the Applicant in January, 1976. Agent Smartt took a statement from the Petitioner and during the conversation between Agent Smartt and Petitioner, the Petitioner stated that he knew the alleged victim, but had never left the Chattanooga area with her. (T. 99)

The State also offered the testimony of Charles Black, who in 1976 was an investigator with the Catoosa County Sheriff's

Department. Investigator Black also took a statement from the Petitioner in January, 1976, and the Petitioner told the investigator during their conversation that he had been out with the victim three (3) times but that he had never been to Georgia with her. (T. 108) (Emphasis supplied)

After the State closed their presentation of the facts, the Petitioner did not present any evidence and rested on his plea of not guilty.

REASONS FOR GRANT OF WRIT OF CERTIORARI

WAS THE RIGHT OF THE PETITIONER TO DUE PROCESS OF LAW AS OUTLINED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES VIOLATED BY THE FACT THAT THE TRIAL JUDGE IN THE CASE DID NOT CHARGE THE JURY ON THE ONLY DEFENSE PRESENTED BY THE EVIDENCE IN THE CASE, THAT BEING THE DEFENSE OF ALIBI.

In HENDERSON vs. STATE, 148 Ga. App. 659, the Court of Appeals stated their rule relative to the trial court's duty to charge on the defense of alibi. The Court stated:

> "Both this court and the Supreme Court have consistently held that where alibi is the sole defense of the accused, the failure of the trial court to charge on the defense of alibi, even in the absence of a request, is reversible error where there is some evidence to support it." PEPPER vs. STATE, 143 Ga. App. (1); HOWARD vs. STATE, 141 Ga. App. 238, 239 (4) and cites (p. 661).

The Court of Appeals, in its opinion (p. 1) took the position that the statements made by the Petitioner to Agent Smartt and Investigator Black were insufficient to raise the defense of alibi.

Petitioner contends most strongly that both statements made by him to the investigating officers were unequivocal in their meaning that the Petitioner maintained that he had never been with the alleged victim in Catoosa County, Georgia, which was the proven

scene of the crime charged against him.

As seen in HENDERSON, supra, the charge on alibi must be given where there is some evidence to support it (emphasis supplied) and for the Court of Appeals to merely ignore the dictate of HENDERSON by not recognizing that there was clearly some evidence to support the defense is clearly error.

The Court of Appeals in its opinion (pp. 1,2) goes further in stating that even should the statements made by the Petitioner raise the defense of alibi, the charge need not be given by the Court because the statements supporting the charge were not sworn to. In reaching this conclusion, the Court of Appeals relies on several cases including FIELDS v. STATE, 233 Ga. 723, 724 (3) dealing with the old unsworn statement which used to be a facet of our state's criminal procedure.

Petitioner contends that the Court of Appeals analogy in applying the procedure of making an unsworn statement to the issue argued by the Petitioner is unfounded. Would

the Court of Appeals or the State of Georgia argue that an out-of-court unsworn statement made by a criminal defendant in which he fully confessed all elements of a criminal act be insufficient to establish the guilt of the Defendant for that act? The answer is obviously no, yet the Court of Appeals in its opinion says that merely because the defense of alibi was raised by the Defendant in an out-of-court unsworn statement, it is necessarily insufficient to raise the defense and necessitate a charge on alibi.

It must be noted that the State through its own witnesses introduced the evidence on which Petitioner relies and certainly they should be bound by that evidence.

CONCLUSION

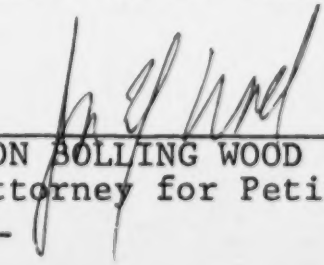
In conclusion, with respect to this reason for the granting of the Petition for Writ of Certiorari, Petitioner argues that for the trial court not to charge a criminal jury the state law which applies to the one

and only defense presented by the evidence in the case and available to the Defendant is per se a violation of the "Due Process" clause of the Fifth Amendment of the United States Constitution.

The logic and reasoning of the Court of Appeals of Georgia as expressed in its opinion is faulty and should not be left standing.

It was necessary for the trial court to charge the criminal jury in this case on the defense of alibi in order to afford the Petitioner herein his right under the Fifth and Fourteenth Amendment to the United States Constitution and because this was not done, the trial court commited error; the Court of Appeals erred in affirming the opinion of the trial court and the Supreme Court of the State of Georgia erred in denying the Writ of Certiorari from the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,



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59832. SMITH v. THE STATE.

SOGNIER, Judge.

Smith was convicted in the Superior Court of Catoosa County of rape. On appeal he contends the trial court erred by failing to charge on the defense of alibi. The defense presented no evidence in this case. However, prior to trial, Defendant made out-of-court statements to an FBI agent and a deputy sheriff, neither of which were under oath. The FBI agent and the deputy sheriff later testified as to these two out-of-court statements. Based on this evidence, Appellant contends the trial court should have charged the jury on the defense of alibi, even without request, pursuant to the holding in Henderson v. State, 148 Ga. App. 659 (252 SE2d 83) (1979). However, Henderson provides that this rule applies where alibi is the sole defense and "where there is some evidence to support it." Id., at 661. These

prior statements of Appellant, repeated in court by the state's witnesses, are insufficient to raise the defense of alibi. Even assuming that they did, our Supreme Court has held: "'This court has upon many occasions ruled that it is not error to fail to charge on alibi when there is no request therefor and the onoy basis for alibi consist of a Defendant's unsworn statement. (Cit.)'" Fields v. State, 232 Ga. 723, 724 (3) (208 SE2d 505) (1975). We deem this analogy controlling in this instance and accordingly, the enumeration of error is without merit.

Judgment affirmed. Deen, C. J., and Birdsong, J., concur.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, September 24, 1980

Dear Sir:

Case No. 36797, Smith vs. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

s/Mrs. Joline B. Williams
Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari from the Court of Appeals of the State of Georgia upon the following by placing a copy of same in an envelope properly addressed to him and depositing same in the United States Mail with sufficient postage thereon to reach its destination, to-wit:

The Honorable William Campbell
District Attorney
Walker County Courthouse
LaFayette, Georgia 30728

Attorney General's Office
132 State Judicial Building
Atlanta, Georgia 30334

This 11th day of Dec., 1980.

ATTORNEY FOR PETITIONER